

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

<b>STATE OF DELAWARE</b>	)	
	)	<b>CRIMINAL ACTION NUMBERS</b>
<b>v.</b>	)	
	)	<b>IN-10-08-1730 thru IN-10-08-1733</b>
<b>EDGARD N. NIEVES-TORRES and</b>	)	<b>ID No. 1005008310</b>
<b>WINTO RUIZ-NOLASCO</b>	)	
	)	<b>IN-10-08-1734 thru IN-10-08-1737</b>
	)	<b>ID No. 1005006311</b>
<b>Defendants</b>	)	

*Submitted: March 1, 2011*

*Decided: April 25, 2011*

***MEMORANDUM OPINION***

*Upon Motion of Defendants to Suppress - **DENIED***

*Appearances:*

Andrew J. Vella, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State of Delaware

Joseph W. Benson, Esquire, Wilmington, Delaware, Attorney for Defendant Edgard N. Nieves-Torres

Joseph A. Gabay, Esquire, Wilmington, Delaware, Attorney for Defendant Winto Ruiz-Nolasco

HERLIHY, Judge

Defendant Edgard N. Nieves-Torres has moved to suppress all physical evidence obtained during the search of his person, the vehicle in which he was a passenger, and a storage unit located at Tri-State Self Storage, to which both defendants allegedly had access. Winto Ruiz-Nolasco incorporates his co-defendant's motion to suppress evidence and evidence obtained at Tri-State Self Storage, and additionally moves to suppress all physical evidence obtained from the search of a storage unit located at Reybold Self Storage. The two are also moving to suppress statements they made in conjunction with the search.

The defendants are charged with trafficking more than 100 grams of cocaine; possession with intent to deliver cocaine; maintaining a vehicle for using/keeping cocaine; and conspiracy second degree. The evidence, based on what the Court heard at the suppression hearing, appears to be virtually the same for both defendants. The evidence as it relates to the warrantless seizure of the defendants and one of the search warrants is inextricably intertwined. The second search warrant which Ruiz-Nolasco above seeks to suppress incorporates evidence from the seizure and the result of the execution of the first search warrant. In short, the only way to avoid multiple hearings, etc., was to have one on both motions.

### ***Procedural History***

To address various counsel comments made at the trial call on April 12, 2011, the Court views it necessary to recite some of the procedural history in this case:

1. The defendants were indicted July 6, 2010.
2. Both were arraigned July 27, 2010.
3. On July 30, 2010, a scheduling order was issued setting a January 19, 2011 trial date.
4. On September 27, 2010, the Court continued that trial date because a key police officer witness was pregnant and due around January 15, 2011.
5. On September 30, 2010, a new trial date of February 23, 2010, was set.
6. Nieves-Torres filed his motion to suppress on September 20, 2010.
7. On October 4, 2010, this Court granted the State's continuance request of the November 19, 2010, suppression hearing. The police officer was unavailable.
8. A new suppression hearing was set for November 12, 2010, but it was continued because Ruiz-Nolasco wanted to file his motion to suppress past the deadline.
9. Ruiz-Nolasco filed his motion to suppress on November 11, 2010, and as such would not have permitted the State to have adequate time to file its reply.
10. A new hearing date was set for December 20, 2010 at which time both motions would be heard, but it was continued because Ruiz-Nolasco's attorney was unavailable.
11. The State filed its responses to the suppression motion on December 13, 2010.
12. February 16, 2011, the suppression hearing was held. At the conclusion of the hearing, the Court ordered supplemental briefing. Because of this order, the February 23rd trial date was continued.
13. February 28, 2011, the State and Ruiz-Nolasco filed their briefs.

14. March 1, 2011, Nieves-Torres filed his supplemental brief.

15. The case was set for trial on April 12, 2011, at which time the Court announced it was denying the motions and that an opinion would follow.

Since the defendants challenged the validity of the warrantless seizure, the evidence recited below comes from the hearing testimony. Some of that testimony was set out in the affidavits of probable cause for the two search warrants the Court will delineate accordingly.

### ***Facts***

In April 2010, officers of the Wilmington Police Department received a tip from a past proven reliable confidential informant that a Hispanic man named “Aniba” was selling large quantities of cocaine in the Wilmington vicinity. From a prior arrest in 2006, the police knew “Aniba” to be Edgar N. Nieves-Torres (“Nieves-Torres”). He was alleged to be working with a man named “Winto,” later identified as Winto Ruiz-Nolasco (“Ruiz-Nolasco”). The informant told police that Nieves-Torres received the orders for drugs, and that Ruiz-Nolasco would “make the drop” by delivering the goods to the customers. They were also informed that Ruiz-Nolasco drove a gray Nissan Altima, and worked at the Zenith plant off of Cherry Lane in New Castle, Delaware.

Police began surveillance of the two men in early April 2010 shortly after they received the informant’s information. One of these officers was Detective Chris Cunningham (“Det. Cunningham”). Police saw Ruiz-Nolasco get into the Altima at

Zenith. During surveillance the police also saw Nieves-Torres drive a blue Ford Explorer, which would be dropped off at the Zenith plant by an unidentified Hispanic woman. On no occasion was any drug dealing specifically observed. On April 12, 2010, the police followed Ruiz-Nolasco, who was driving the Altima, to the Reybold Self-Storage facility on Centerville Road in Wilmington. They observed him enter unit 703, and leave after approximately five to ten minutes. At the hearing, Det. Cunningham noted that many drug dealers keep large stashes of drugs in different storage units, instead of in their homes.

On May 11, 2010 around 8 p.m., Detective Cunningham set up surveillance at Nieves-Torres' home, 508 S. Van Buren Street in Wilmington. The blue Ford Explorer that Ruiz-Nolasco had been observed driving was parked around the corner. Nieves-Torres walked out of an alley and entered into the passenger side of a maroon Buick. A few moments later, Ruiz-Nolasco walked out of the same alley and got into the driver's seat of the car. Nieves-Torres drove the Buick to the Tri-State Storage facility on DuPont Highway where there was a closed gate. He entered a key pad entry, the gate opened and he drove inside. Det. Cunningham had followed them there in an unmarked car. He was in civilian clothes. The gate closed before he could enter. After a moment's reflection, he jumped the fence and headed in the direction the Buick had taken. As he was running down the street between the storage units, the Buick re-appeared. It was about twenty (20) feet from him when he first encountered it. Instead of stopping at a unit, the car came in his direction as though it was exiting the premises. It stopped abruptly. Ruiz-Nolasco then

reversed quickly. Det. Cunningham did not gesture toward the vehicle or in any way direct it to stop. He neither had his gun drawn nor did he display his badge. The Buick backed up went to a far corner of the facility, Ruiz-Nolasco got out and threw something over the fence into a swampy area of high reeds, got back in the car and continued driving until he was blocked by a police car. Det. Cunningham thought he was discarding drugs though the police later recovered \$6000.00 bundled with rubber bands instead. Other officers arrived on scene, and stopped the Buick without incident. Police searched the defendants and the Buick. No contraband or weapons were discovered.

After the defendants were apprehended at Tri-State Storage, the police contacted the facility owners to view surveillance tape and inquire about who owned the storage unit. When viewing surveillance footage, the police determined that Ruiz-Nolasco entered unit H-1 for about two minutes before leaving, but it was unclear whether he removed anything from the unit or placed anything inside. This unit is actually rented by an Ingrid Gonzales, Nieves-Torres' girlfriend. Police used a drug sniffing dog, which alerted on the exterior of the unit. After obtaining a search warrant from Justice of the Peace Court 20 on May 12, 2010, they searched unit H-1 at about 2:45 a.m. Inside the unit was the gray Nissan Altima, with around 355 grams of cocaine in the trunk. On May 14th, the police obtained a search warrant for the Reybold Storage facility which they had seen Ruiz-Nolasco enter on April 12th. He was seen driving the Nissan Altima which was searched on May 12th and in which the 355 grams of cocaine were located.

A suppression hearing was held on February 16, 2011. Detective Cunningham testified that he has been working in the drug unit for 7 to 8 years, and has been involved in over 100 drug investigations during that time. Leading up to the encounter at Tri-State Storage, police were unable to corroborate any overt illegal activity on the part of either Nieves-Torres or Ruiz-Nolasco. At the suppression hearing, Det. Cunningham testified that despite the fact that no such activity was witnessed, the defendants engaged in behavior that the police know, through training and experience, is an indication of large scale drug dealing. First, the defendants drove to a storage center. The tip given to the police about the defendants said that they were dealing over one kilogram of cocaine per week, which is considered to be a very large amount. Det. Cunningham testified that he knows through training and experience that many large scale drug dealers do not usually keep their merchandise at home, and further, that storage centers like Tri-State are characteristically used to store large caches of illegal drugs. The State argued that this is sufficient corroboration of the informant's tip, that, when coupled with the defendants' behavior when encountering the police at Tri-State, provided a sufficient basis to stop defendants and investigate further. The police also went to the Reybold Self Storage location which Ruiz-Nolasco had previously visited. After a canine sniff also indicated positively, they obtained a search warrant for the unit. Illegal narcotics were also discovered therein. Ruiz-Nolasco alone moves to suppress that search.<sup>1</sup>

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<sup>1</sup> The Court is assuming for the purposes of this motion that whatever evidence seized at the Reybold facility will be used against both defendants. However, Nieves-Torres has not shown  
(continued...)

### *Parties' Contentions*

Nieves-Torres argues that the stop of the vehicle violated his constitutional rights because the police had no reasonable articulable suspicion to believe that a crime had been, was being, or was about to be committed related to the operation of the Buick or the defendants.<sup>2</sup> He notes that in the weeks leading up to the stop, the officers did not observe any illegal conduct during their surveillance of Nieves-Torres and Ruiz-Nolasco. The informant did not give any factual specificity as to the time and place any alleged drug transactions took place, or the source of contraband in their possession. Instead, the informant merely noted the type of drug, cocaine, and “Wilmington,” a large geographical area. Nieves-Torres claims that this sort of information, without corroboration, is insufficient to support a vehicle stop or to constitute probable cause in support of the warrant issued to search the storage unit. As such, all evidence resulting from the illegal stop and search must be suppressed.<sup>3</sup> In addition, claiming that seizure was invalid and the warrants lack probable cause, Nieves-Torres seeks suppression of any statements he subsequently made as fruit of the poisonous tree.

First, the State responds that Nieves-Torres has no standing to challenge the search of the storage unit. The unit is not registered in his name, nor did he enter it. He does not

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<sup>1</sup>(...continued)  
or argued any standing to challenge that search.

<sup>2</sup> *Coleman v. State*, 562 A.2d 1171, 1174 (Del. 1989).

<sup>3</sup> *Wong Sun v. United States*, 371 U.S. 471 (1963).



have a “legitimate expectation of privacy in the invaded place.”<sup>4</sup> Second, the State claims that Nieves-Torres was not seized when they saw Cunningham; the officer was in plain clothes and not making any motions to the Buick’s occupants. Instead, they were not detained until after Ruiz-Nolasco “panicked and fled” upon the sight of a civilian clothed man approaching, and tossed an unidentifiable object over the fence.<sup>5</sup> Therefore, the State argues, the defendants’ actions, coupled with the tip from a past proven reliable informant and the police training and experience, gave the police reasonable, articulable suspicion to stop the car.

Ruiz-Nolasco adopts and incorporates Nieves-Torres’ motion and the rationale therein in his two motions to suppress. In his first motion, he claims that the film does not show Ruiz-Nolasco placing or removing anything inside the Tri-State storage unit at the time alleged. Additionally, he claims that paragraph 19 of the search warrant is “superfluous and irrelevant to this application and should be stricken,” but does not specify the contents of that paragraph in his motion. At the hearing, Ruiz-Nolasco’s counsel made it clear that he was objecting to the use of the positive canine indication as probable cause in support of the search warrant. In his second motion, Ruiz-Nolasco contests the use of his visit of the Reybold Self-Storage in April as probable cause to support a warrant in search for drugs which were found within that unit. He states that the affidavit here is of

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<sup>4</sup> *Righter v. State*, 704 A.2d 262, 265 (Del. 1997).

<sup>5</sup> State’s Resp. to Nieves-Torres’ M. to Suppress, 4.

the “barebones” variety criticized in *United States v. Leon*.<sup>6</sup> He, too, moves to suppress any statements he made on the sole basis of fruit of the poisonous tree. The State responds to Ruiz-Nolasco’s motion with an almost identical statement of facts, and its first legal argument is the same as those in response to Nieves-Torres. In addition, the State argues that the canine sniff of the unit is not a search, and thus could not violate defendants’ expectation of privacy as determined by the Delaware Supreme Court in *Nelson v. State*.<sup>7</sup>

### ***Standard of Review***

When a defendant moves to suppress evidence seized as a result of a warrantless search, the State has the burden of proving the propriety of the search.<sup>8</sup> While lacking a similar clear statement in the case of a warrantless seizure, the same principle would apply to the State’s burden when that seizure itself is challenged.

### ***Discussion***

#### ***Vehicle Stop***

To determine whether a stop has occurred, the Court must first discern when the suspect was “stopped” by police.<sup>9</sup> A stop has occurred when police conduct communicates

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<sup>6</sup> 468 U.S. 897, 914 (1984).

<sup>7</sup> 1998 WL 171534 (Del.).

<sup>8</sup> *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001).

<sup>9</sup> *Purnell v. State*, 832 A.2d 714, 719 (Del. 2003).

to a reasonable person that he or she is “not free to ignore police presence.”<sup>10</sup> The Court then determines if the officer had the requisite level of reasonable articulable suspicion at the time of the stop.<sup>11</sup> A seizure occurs when there is either physical force restraining the suspect, or a submission to authority by the suspect.<sup>12</sup> Defendants were clearly stopped in this case. The only issue remaining is whether police had sufficient reasonable articulable suspicion to stop defendants.

A police officer may conduct an investigatory stop and seizure of any person if the officer has reasonable articulable suspicion that the person is involved in criminal activity. They may “demand the person’s name, address, business abroad, and destination.”<sup>13</sup> This is a lower standard than the probable cause standard necessary to arrest.<sup>14</sup> Delaware’s reasonable suspicion standard requires police officers to “point to specific and articulable facts which taken together with all rational inferences from those facts, reasonably warrant the intrusion”<sup>15</sup> or “warrant the belief that a crime is being or has been committed.”<sup>16</sup>

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<sup>10</sup> *Purnell*, at 719.

<sup>11</sup> *State v. Rollins*, 922 A.2d 379, 383 (Del. 2007).

<sup>12</sup> *Lopez-Vazquez v. State*, 956 A.2d 1280, 1286-1287 (Del. 2008).

<sup>13</sup> *Cummings v. State*, 765 A.2d 945, 948 (Del. 2001).

<sup>14</sup> 11 Del. C. § 1902; *Coleman*, 562 A.2d at 1174, *cert. denied*, 493 U.S. 1027 (1990). See *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

<sup>15</sup> *Coleman*, at 1174; *Terry*, at 22.

<sup>16</sup> *Quarles v. State*, 696 A.2d 1334, 1337 (Del. 1997).

The Court must evaluate the situation in light of the totality of the circumstances.<sup>17</sup> This is not a purely objective standard; police conduct is “two-pronged, based upon: (1) all the circumstances, including objective observations and consideration of the modes or patterns of operation of certain kinds of law breakers; and (2) the inferences and deductions that a trained officer could make which might well elude an untrained person.”<sup>18</sup> In drug trafficking cases, Delaware courts have held that the totality of the circumstances must include “the whole picture as viewed through the eyes of a police officer who is experienced in discerning the ostensibly innocuous behavior that is indicative of narcotics trafficking.”<sup>19</sup> The courts have also adopted the United States Supreme Court’s adherence to “the reality that much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs...may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.”<sup>20</sup>

As to whether corroboration of innocent tips can lead to reasonable suspicion to stop, “[i]t logically follows that a pattern of behavior interpreted by an untrained observer as innocent could justify an investigatory stop when viewed by experienced law

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<sup>17</sup> *Woody v. State*, 765 A.2d 1257, 1262 (Del. 2001).

<sup>18</sup> *Quarles*, at 1338.

<sup>19</sup> *Id.* at 1337.

<sup>20</sup> *Id.* at 1337, quoting *United State v. Place*, 462 U.S. 696, 704 n.5, 103 S.Ct. 2637, 2643 n. 5, 77 L.Ed.2d 110 (1983).

enforcement agents who are cognizant of current drug trafficking operations.”<sup>21</sup> Specifically relevant to the facts at bar, Delaware courts have also held that when the police observe suspicious behavior, and that behavior is “coupled with the throwing down of an unidentified object,” it is reasonable for the police to believe that a defendant was engaging in some sort of criminal conduct.<sup>22</sup> Abandonment of property from a vehicle in such a manner also forms the basis for a subsequent search of that vehicle.<sup>23</sup>

Viewing the totality of the circumstances in this case, there was sufficient reasonable articulable suspicion to stop the defendants at Tri-State storage. Det. Cunningham observed several objective facts that fulfill the requirement of the first prong of the totality of the circumstances inquiry. First, the past proven reliable informant tipped police off to the fact that these two men were working together, and they met up at Nieves-Torres house. From here, the police observed them going to the Tri-State Storage location. The vehicle was headed towards the exit, when the defendants apparently observed Det. Cunningham. Upon observing Det. Cunningham, who was in plain clothes not making gestures of any kind, the defendants abruptly stopped and reversed their car in great haste, away from him. Det. Cunningham ran after the vehicle. When the car reached the opposite

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<sup>21</sup> *Quarles*, at 1338.

<sup>22</sup> *State v. Gibbs*, 2004 WL 2191032 at \*3 (Del. Super. 2004).

<sup>23</sup> *Hunter v. State*, 815 A.2d 730 (Del. 2002); *State v. Sullins*, 2007 WL 2083657 (Del. Super.).

end of the storage facility, he observed Ruiz-Nolasco get out of the car, discard an unidentified object over the fence into a swampy area outside the storage facility, and return to the Buick which resumed backing up until a police car blocked it. The car and the defendants were then “seized.”<sup>24</sup>

As to the second prong, Det. Cunningham has sufficiently established that this type of behavior, viewed through the eyes of a trained police officer, indicated that criminal activity could be occurring so as to justify a stop. He testified that large-scale drug dealers often used storage centers like Tri-State Storage to keep large caches of contraband. The tip the police had received said that Nieves-Torres and Ruiz-Nolasco were moving over a kilogram of cocaine per week, which would likely facilitate a need to utilize a storage unit. During the defendants’ flight, Ruiz-Nolasco stopped to discard an object from the vehicle. Although flight from an area upon police arrival does not alone raise reasonable suspicion,<sup>25</sup> Delaware courts have ruled that suspicious behavior coupled with abandonment of unidentified property during flight can amount to reasonable suspicion.<sup>26</sup> Det. Cunningham testified that he believed this object was drugs, though it later proved

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<sup>24</sup> *Harris v. State*, 806 A.2d 119 (Del. 2002).

<sup>25</sup> *Illinois v. Wardlow*, 528 U.S. 119, 139 (2000); *Lopez-Vazquez v. State*, 956 A.2d at 1288-1289; *Howard v. Voshell*, 621 A.2d 804, 807 (Del. Super. 1992).

<sup>26</sup> In addition, Det. Cunningham was in plain clothes and made no gesture towards them, so it is difficult to even confirm that the defendants fled upon police arrival. It is unclear from the record whether they saw the other officers before turning around or if in their other police contact they became acquainted with Cunningham as a police officer.

to be \$6,000 in cash, secured with a rubber band.<sup>27</sup> To an untrained observer, this behavior could possibly be interpreted as innocent (though strange), but in the eyes of a trained police officer, the defendants were clearly avoiding contact and discarding contraband into a marshy area while fleeing in a manner that was highly suspicious and indicated that criminal activity was likely afoot.

Since the seizure and subsequent search of defendants was supported by reasonable suspicion, Nieves-Torres and Ruiz-Nolasco's motions to suppress evidence obtained and statements made in subsequent to their seizure at Tri-State Storage are DENIED.

#### ***Warrants to Search Tri-State Storage Unit and Reybold Storage Unit***

Under the Delaware Constitution, a search warrant cannot be issued "unless there be probable cause supported by oath or affirmation."<sup>28</sup> Title 11, §§2306 - 2307 of the Delaware Code outline the statutory requirements for determining whether probable cause exists.<sup>29</sup> <sup>30</sup> An affidavit of probable cause in support of a search warrant must contain

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<sup>27</sup> Delaware Courts have held that large amounts of cash on a suspect, even despite the absence of illegal drugs, can be probative evidence that the suspect may be involved in drug dealing. *See, e.g., Hoey v. State*, 689 A.2d 1177, 1181 (Del. 1997). That it was cash instead of drugs is a post-stop/seizure fact this Court cannot take and did not take into account when analyzing the validity of the stop/seizure.

<sup>28</sup> *Del. Const.*, Art. 1, §6.

<sup>29</sup> The application or complaint for a search warrant shall be in writing, signed by the complainant and verified by his oath or affirmation. It shall designate the house, place, conveyance or person to be searched and the owner or occupant thereof (if any), and shall describe the things or persons sought as particularly as may be, and shall substantially allege the cause for which the search is made or the offense committed by or in relation to the persons or things searched for, (continued...)

sufficient facts to establish probable cause within the “four corners” or on the face of the affidavit.<sup>31</sup> Probable cause exists in the affidavit where there is “a logical nexus between the items sought and the place to be searched.”<sup>32</sup> Such a nexus can be “inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide evidence of a crime.”<sup>33</sup> This type of “factual showing is two-fold: first, there must be probable cause that a crime was committed, and second, there must be probable cause to believe that evidence of such crime can be found at the place.”<sup>34</sup> The facts set forth must be enough for “a neutral judicial officer to form a reasonable belief that an offense has been committed and that

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<sup>29</sup>(...continued)

and shall state that the complainant suspects that such persons or things are concealed in the house, place, conveyance or person designated and shall recite the facts upon which such suspicion is founded. 11 *Del. C.* §2306.

<sup>30</sup> Section 2307 authorizes a judicial officer to issue a warrant:  
If the judge, justice of the peace or other magistrate finds that the facts recited in the complaint constitute probable cause for the search, that person may direct a warrant to any proper officer or to any other person by name for service. The warrant shall designate the house, place, conveyance or person to be searched, and shall describe the things or persons sought as particularly as possible, and may be made returnable before any judge, justice of the peace or magistrate before whom it shall also direct to be brought the person or thing searched for if found, and the person in whose custody or possession such person or thing is found, to be dealt with according to law. 11 *Del. C.* §2307.

<sup>31</sup> *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000).

<sup>32</sup> *Id.* at 811.

<sup>33</sup> *State c. Cannon*, 2007 WL 1849022 at \*4 (Del. Super.).

<sup>34</sup> *Cannon*, 2007 WL 1849022 at \*4.



seizable property would be found in a particular place or on a particular person.”<sup>35</sup> Delaware courts have rejected a hypertechnical approach to the evaluation of the search warrant affidavit in favor of a common-sense interpretation, and a determination of probable cause by the issuing magistrate will be paid great deference.<sup>36</sup> “Accordingly, we have held that ‘the affidavit supporting the search warrant must be considered as a whole and not on the basis of separate allegations.’”<sup>37</sup>

An affidavit of probable cause must be based on current, not stale information.<sup>38</sup> Statements of dates and times are to be instructive, but “not dispositive to ascertaining the existence of probable cause.”<sup>39</sup> In other words, “probable cause must exist to believe that the specified items are *presently* on the premises...”<sup>40</sup> Some other factors the court considers in determining whether probable cause is stale is what type of property is sought, and whether it is likely it will remain in one location.<sup>41</sup> Whether probable cause exists in the four corners of the affidavit “cannot be quantified by simply counting the number of

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<sup>35</sup> *Dorsey* at 811.

<sup>36</sup> *Dorsey*, at 811; *State v. Ivins*, 2004 WL 1172351 (Del. Super)(citations and internal quotations omitted).

<sup>37</sup> *Dorsey*, at 811.

<sup>38</sup> *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984)(citations omitted).

<sup>39</sup> *Sisson*, at 297.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

days between the occurrence of the facts relied upon and the issuing of the affidavit.”<sup>42</sup>

As to canine sniffs, the Delaware Supreme Court has held that a canine sniff does not constitute a search under the meaning of the Fourth Amendment.<sup>43</sup> Once a dog alerts to the possible presence of narcotics, police have probable cause to search the place to which the dog has alerted.<sup>44</sup>

***Probable Cause Existed to Support Search of the Tri-State Storage Unit***

To determine if there are adequate facts to support probable cause to search the Tri-State Storage unit, there must first be probable cause that a crime was committed. Second, there must be probable cause to believe that evidence of such crime can be found in the storage unit.

The affidavit in support of the search of the Tri-State unit states:

- 10) Your affiants can truly state that they are Robert C. Cunningham and Joseph Leary of the Wilmington Department of Police and are currently assigned to the Drug, Organized Crime and Vice division have over 30 years of combined police experience with the department.
- 11) Your affiants can truly state that these investigators received information from a past proven reliable confidential informant during April 2010 who advised that a Hispanic male subject known as “Aniba”

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<sup>42</sup> *Jenson*, at 112, quoting *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir.1972).

<sup>43</sup> *Nelson*, 1998 WL 171534 at \*4.

<sup>44</sup> *Id.*

was selling large amounts of cocaine to customers in the City of Wilmington, Delaware and surrounding customers in New Castle County. The informant classified "Aniba" as a kilo a week dealer. The informant also advised that "Aniba" was acting in concert with a second Hispanic male subject known as "Winto". It should be noted "Aniba" was known to detective Cunningham and Detective Hector Cuadrado (Wilmington Police) as Edgar Neives Torres 9/30/76 and known to reside at 508 S. Vanburen Street, Wilmington, Delaware from a past title 16 investigation resulting in the seizure of a large amount of cocaine. Further, Detective Cuadrado advised that the informants identified "Winto" and as Winto Ruiz-Nolasco 4/1/88.

- 12) Your affiants can truly state that an inquiry was conducted via DELJIS on Winto Ruiz-Nolasco 4/1/88 which indicated that same was wanted on an outstanding Capias for DUI. Likewise, a photograph of Ruiz-Nolasco was obtained. An inquiry was also conducted on Edgar Neives-Torres 9/30/76 which indicated that Torres possess a suspended Delaware drivers license. A photograph of Torres was also obtained from DELJIS.
- 13) Your affiants can truly state that during the second week of April surveillance was conducted on Winto Ruiz-Nolasco by these investigators. At that time Nolasco was operating a gray in color 2008 Nissan Altima bearing Delaware registration 463266. During that time he was tailed to Reybold self storage located at 1215 Centerville Road, Wilmington, Delaware. At that time he responded to storage unit 703 and remained for a brief period of time and then exited same.
- 14) Your affiants can truly state on the 11th of May 2010 these investigators and other members of the Wilmington Department of Police Drug Unit set up surveillance at 508 S. Vanburen Street, Wilmington, Delaware. At approximately 2010 hours Edgar Torres was observed exiting a alleyway behind his home and entering the passenger side of a maroon in color Buick bearing Delaware 54081 which was parked in the 1000 block of Sycamore Street. A short time later Winto Ruiz-Nolasco was observed exiting the same alleyway and entering the drivers side of the vehicle.

- 15) Your affiants can truly state that the vehicle pulled off and was tailed by these investigators and assisting units to the 4000 block of Dupont Highway. The vehicle subsequently entered Tri-State Self Storage (opened the gate with a code) and then traveled down the center lane of the storage facility. A short time later these affiants then entered the storage facility to observe the vehicle. At that time the subjects observed Detective Cunningham, placed the vehicle in reverse and traveling at a high rate of speed. The vehicle then traveled to the corner of the complex where Nolasco exited the vehicle and was observed making a throwing motion towards an area of dense bush. The vehicle then sped away at a high rate of speed but was eventually stopped in the complex.
- 16) Your affiants can truly state that these investigators and assisting units subsequently conducted an area search of the brushy area where the throwing motion was observed and located \$6,000.00 U.S.C.
- 17) Your affiants can truly state that a representative of Tri-State Self Storage was contacted. At that time video of the complex was reviewed which indicated that the driver (Nolasco) entered unit H-1. It was also determined that the Unit was rented in the name of Ingrid Gonzalez. Gonzalez is known by Detective Cunningham as the girlfriend of Torres.
- 18) Your affiants can truly state that K-9 Officer Hamrick (WPD) and K-9 GOCHA responded to the storage unit to H-1 and examined same for the presence of controlled substances. At that time K-9 GOCHA positively indicated for the presence of controlled substances on the exterior of the unit.
- 19) Your affiants can truly state that K-9 Officer Hamrick and K-9 GOCHA then responded to Reybold Self Storage located 1215 Centerville Road Storage Unit 703. At that time K-9 Gocha positively indicated on the exterior of the unit for the presence of controlled substances.<sup>45</sup>

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<sup>45</sup> State's Ex. 1, Suppression Hr'g.

As discussed previously, sufficient facts existed on May 11, 2010 at the Tri-State Storage Center to amount to reasonable suspicion that the defendants were presently involved in criminal activity at that location. When the police recovered the \$6,000 in cash, they had an even stronger fact to support probable cause that the defendants were engaging in the sale of illegal narcotics. After apprehending the defendants, the police immediately sought information from Tri-State Storage as to which unit they had entered, and determined from video footage that it was unit H-1. They conducted a canine operation immediately, and the dog, “Gocha” indicated positively for narcotics on the exterior of the unit. This canine sniff did not violate the defendants expectation of privacy against unreasonable search and seizure, as canine sniffs are not a “search” requiring a constitutional analysis. Although the positive canine indication alone would not provide adequate probable cause to believe that the defendants were using unit H-1 to store drugs, and that drugs would be found if the police searched therein, these additional factual discoveries also support probable cause.

Although Nieves-Torres arguably was not the one to throw the money away, and he did not go into unit H-1 in the video footage, sufficient facts existed to show that he likely had access to the unit and its contents. First, the tip said that the two defendants were working together, and that Nieves-Torres took the drug orders, and Ruiz-Nolasco was the one who actually physically handled the drugs and delivered them. Their behavior during their time at Tri-State Self Storage corroborates this tip, as Ruiz-Nolasco seemed

to be checking on the cache and handling the money. Second, the storage unit was registered in the name of Nieves-Torres' known girlfriend, Ingrid Gonzales, connecting him to the unit in a personal way. It is not unusual for drug dealers to not have cars used in their trade registered in another's name. The same easily applies to storage units used for keeping drugs. This, too, is a factor in the probable cause analysis.

Specific and articulable facts existed within the four corners of the affidavit to support probable cause in the search warrant. Therefore, defendants' motions to suppress evidence obtained from within the Tri-State Storage unit are DENIED.

***Probable Cause to Search the Reybold Self Storage Unit Was Not Stale***

The first ten paragraphs used to show probable cause for the search warrant for the Reybold facility are identical to the first ten paragraphs in the Tri-State search warrant. There are, however, additional facts added to the Reybold warrant based on the Tri-State search and Gocha's visit to the Reybold unit.

- 20) Your affiants can truly state that on the 12th of May 2010 Justice of the Peace Court 20 search warrant was executed at Tri-State Storage unit H-1. At that time the gray Nissan Altima bearing registration 463266 was located in the unit. Upon searching the trunk of the vehicle 355 grams of cocaine was located. On the same date a Justice of the Peace Court 20 search warrant was also executed at Reybold self storage unit 703. Upon opening the unit, it became apparent that the unit was not the correct unit as it contained a sail boat and documentation indicating that same was rented by an individual not involved in this investigation.
- 21) Your affiants can truly state that on the 12th of May 2010 a subpoena was sent to Reybold self storage requesting records on unit(s) that may be rented by Ruiz-Nolasco and or Nieves-Torres. On the 14th of May

2010 these investigators responded to Reybold storage and obtained paperwork in the name of Winto M. Ruiz-Nolasco, to include a photo copy of Ruiz-Nolasco's drivers license presented to Reybold staff at the time the unit was rented, which indicated he rents unit 833.

- 22) Your affiants can truly state that K-9 Officer Hamrick and K-9 GOCHA then responded to Reybold Self Storage located at 1215 Centerville Road Storage Unit 833. At that time K-9 Gocha positively indicated on the exterior of the unit for the presence of controlled substances. It should also be noted keys seized from Ruiz-Nolasco at the time of his arrest (12th of May 2010) unlocked the lock on storage unit 833.<sup>46</sup>

As the affidavit shows, Ruiz-Nolasco visited Reybold Self Storage unit 703 on April 12, 2010. He was driving the Nissan later found at the Tri-State Storage facility with 355 grams of cocaine in it. But he also submits that the probable cause to search this unit was stale because he was there about a month before the application to search it. The State argues that there was sufficient probable cause because of the tips from the informant and because of the valid discoveries at Tri-State Storage. The test for determining staleness is as follows:

With respect to staleness, it is clear that probable cause must be based on current information, not conjecture, for stale information will not support a finding of probable cause. In other words, probable cause must exist to believe that the specified items are *presently* on the premises... While statements of dates and times are instructive, they are not dispositive to ascertaining the existence of probable cause. Instead, magistrates and courts must consider other factors including the kind of property for which authority to search is sought, and whether the evidence sought is highly

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<sup>46</sup> State's Ex. 2, Suppression Hr'g.

incriminating or consumable and thus less or more likely to remain in one location.<sup>47</sup>

When the police observed Ruiz-Nolasco at Reybold Self Storage, they had neither reasonable suspicion to stop him, nor probable cause to search the unit he entered. Just one month had passed since the since he had been observed there, and it was only after the police searched the Tri-State Storage unit and the Nissan that they took a canine unit to Reybold Self Storage, and sought a warrant when it “positively indicated” on the outside of the unit. The tip from the past proven reliable informant indicated that Ruiz-Nolasco acting with Nieves-Torres was moving over a kilogram of cocaine each week - something that was recurring, in other words. It was not a one event operation. Drug dealers are known to quickly dispose of their caches, and often move drugs around to different locations. At the rate Ruiz-Nolasco was alleged to be distributing cocaine, there was no probable cause to believe that incriminating evidence would be found when he was last observed at the unit in April. However, a week or so after receiving the informant’s tip, the police see Ruiz-Nolasco drive the Nissan later discovered in the Tri-State facility, he had the keys to the facility when arrested a few weeks later, and the same Nissan had 355 grams of cocaine in it when searched. The Court finds there is no “staleness.” Drug investigations are frequently known to take months and this one took from tip to the Reybold search around five weeks.

Ruiz-Nolasco’s motion to suppress the Reybold warrant is DENIED.

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<sup>47</sup> *Sisson*, at 297.



*Conclusion*

For the reasons stated herein, Nieves-Torres and Ruiz-Nolasco's motions to suppress evidence obtained and statements made subsequent to their seizure at Tri-State Self-Storage are **DENIED**. Nieves-Torres and Ruiz-Nolasco's motions to suppress evidence obtained from within the Tri-State Self-Storage unit are **DENIED**. Ruiz-Nolasco's motion to suppress evidence obtained in the search of his unit at Reybold Self-Storage is **DENIED**.

**IT IS SO ORDERED.**

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J.